4 Gray (Mass.) 209. And it is submitted that, in general, circumstances of justification, as for example self-defense or public authority, are of this nature, though they are set up under not guilty. The mode of procedure may well be explained on the ground that criminal pleadings, unlike those in civil actions, have always been required to be made orally and by the defendant in person, a practice which obviously precludes accurate affirmative pleading. When the defendant on an indictment for criminal assault, for example, sets up a plea of self-defense, it would seem that he neither denies the criminal act, nor the criminal intent, (which seems to be nothing else than the intent to do the criminal act.) But this depends, of course, on the definition of the criminal act. Is it, broadly, the striking of the blows; or is it the striking of the blows under any but certain special circumstances? If the former view be correct, justification is an affirmative defense; if the latter, it is negative. It would seem that the former view is the more logical. And that it is correct is pretty conclusively shown by the fact that, while the universal rule is that an indictment must state all the essential elements of the crime, an averment is never required that the act was done without justification.

With reference to the rather indefinite "malice aforethought" which is one of the elements of murder, and which is not the same as mere criminal intent, a further discrimination is perhaps necessary. When the defendant shows that the killing was done in resisting an unlawful arrest or under provocation, this is held to disprove malice. These are therefore negative defenses, and unless the prosecution disproves them beyond a reasonable doubt, the defendant can be convicted of manslaughter only. *Maher* v. *People*, 10 Mich. 212. It would seem that proof of absolute justification on an indictment for murder would even more clearly disprove malice. See HOLMES, COM. LAW, 62. When, therefore, in such a case, the defendant offers evidence of justification for this purpose, it would seem proper to charge that if such evidence raises a reasonable doubt the defendant cannot be convicted of murder. But since malice aforethought is no part of the crime of manslaughter, as to manslaughter justification is only an affirmative defense, and the defendant must be convicted of the lesser crime unless his evidence establishes the justification by a fair preponderance.

It must be admitted that many decisions and perhaps the majority of text-writers support Mr. Burger's position. 2 BISH. CRIM. PR., 4th ed., § 599; MCCLAIN, CRIM. LAW, § 316; 25 AM. & ENG. ENCYC. LAW, 2nd ed., 283, and cases cited. But there are enough cases which reach the opposite conclusion to warrant the view here suggested. *State* v. *Ballou*, 20 R. I. 607; *Weaver* v. *State*, 24 Oh. St. 584.

NEW TRIALS FOR ERRONEOUS RULINGS ON EVIDENCE. — Should an erroneous ruling on evidence be *ipso facto* ground for a new trial? A recent article by Professor Wigmore, showing the great practical importance of a wise answer to this question, should be read by judge, lawyer, and layman. *New Trials for Erroneous Rulings upon Evidence; a Practical Problem for American Justice*, by John H. Wigmore, 3 Columbia L. Rev. 433 (Nov., 1903). By the original English rule, in criminal as well as in civil cases, "an erroneous admission or rejection of a piece of evidence was not sufficient ground for setting aside a verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." But in 1835 the Court of Exchequer announced that an "error of ruling created *per se* for the excepting and defeated party a right to a new trial," and this doctrine persisted as the law in all English courts until modified in civil causes by the Procedure Act of 1875. It has, moreover, come to be supported by the majority of jurisdictions in the United States. Two theories are advanced in support of the doctrine: that "a party has a legal right to the judicial observance of the rules of evidence, *per se*"; that "the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be a

usurpation of the jury's function." The first theory, says Mr. Wigmore, leads to the "exaltation of the ordinary rules of evidence, which are the mere instruments of investigation, into an end in themselves." The second fails to recognize that the jury has always acted under the supervision of the court, and leads to the curious result that the appellate court may overturn a decision of the jury as against the weight of the evidence, but may not consider a particular piece of evidence, so as to say that it would not have affected the same weight of evidence.

As to the practical results of the "Exchequer heresy," the writer forcefully shows that "it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling." Reform is possible, but not by legislation alone; that has been tried in New York and New Jersey, and has failed. There must be, as in England, a "change in spirit." Particularly, says Mr. Wigmore, must the judges no longer be merely umpires at the game of litigation, mere automata. Likewise the "maudlin sentimentality of judges in criminal cases must cease."

THE FELLOW SERVANT DOCTRINE. — A recent article discusses the various attitudes of the United States Supreme Court on the liability of employers for the negligent injury of servants by fellow servants, and endeavors to expound an ultimate test that may best explain past decisions and guide the future. *The Fellow Servant Doctrine in the United States Supreme Court*, by Albert M. Kales, 2 Mich. L. Rev. 79 (Nov., 1903). The earliest theory, according to this writer, upon which the master's non-liability was rested by this court, was that the "servant assumed the risk of the negligence of his co-employee"; but as he obviously did not assume a risk in every case, this test gave way to one based upon the negligent employee's relation to the plaintiff. This in turn proving inadequate, was succeeded in later cases by the conception that the employer's liability must rest, not on the failure of the employee to assume the risk, but on the breach of a positive legal duty owed by the master. This duty is determined rather by the character of the act in the doing of which the negligence occurred than on the relation of the employees to each other. On this line of thought the court has often declared it to be the "duty of the master to use due care to furnish reasonably safe appliances and a reasonably safe place" in which to work. The writer then endeavors to show that in some cases the court has gone beyond this test in holding the master liable, though it has not expressed the principle on which it proceeded. And so Mr. Kales suggests an ultimate formula, which he considers to be supported by the actual decisions and to accord with the present attitude of the court. This formula requires from the employer due care to provide all permanent conditions of safety — as distinguished from those merely incidentally necessary — for his servants, and so when the negligence of a fellow servant occurs in respect to an act done in discharge of this duty, there is a violation of the master's duty. *Cf.* 16 HARV. L. REV. 593. Mr. Kales' treatment is valuable for its exhaustive and accurate historical analysis of the decisions of the Supreme Court upon the fellow servant doctrine.

SUBSEQUENT BIRTH OF CHILDREN AS A REVOCATION OF A WILL. — Under this title the Virginia Law Register contains, in two numbers, a comprehensive and careful survey, by Mr. Marvin H. Altizer, of the statutes of pretermission which obtain in most American states, and of the cases which interpret these statutes. 9 Va. L. Reg. 473, 519 (Oct. & Nov., 1903). These provisions giving rights to a testator's children born after the will was made are discussed, first, with reference to the circumstances necessary for their operation, and, second, as to their effect. The principal questions arise under the first head, and per-